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COURT OF CRIMINAL APPEALS
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IN THE COURT OF CRIMINAL APPEALS OF TEXAS

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COURT OF CRIMINAL APPEALS
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SUZANNE ELIZABETH WEXLER
Appellant
v.

THE STATE OF TEXAS
Appellee

On Petition for Discretionary Review from
Appeal No. 14-17-00606-CR
in the Court of Appeals, Fourteenth District at Houston

Trial Court Cause No. 1513928
177th Judicial District Court of Harris County, Texas
Hon. Robert Johnson, Judge Presiding

APPELLANT'S REPLY BRIEF

Alexander Bunin
Chief Public Defender
Harris County, Texas

Nicholas Mensch
Assistant Public Defender
Harris County, Texas
State Bar of Texas No. 24070262
1201 Franklin St., 13th Floor
Houston, Texas 77002
Phone: (713) 274-6700
Fax: (713) 368-9278
nicholas.mensch@pdo.hctx.net

IDENTITY OF PARTIES AND COUNSEL

APPELLANT:	Suzanne Wexler TDCJ# 02141824 Crain Unit 1401 State School Road Gatesville, Texas 76599
TRIAL COUNSEL FOR APPELLANT:	James Dyer State Bar of Texas No. 06315700 1305 Prairie St., Suite 100 Houston, Texas 77002
APPELLANT'S COUNSEL AT MOTION FOR NEW TRIAL:	Sarah Wood State Bar of Texas No. 24048898 Scott Pope State Bar of Texas No. 24032959 Assistant Public Defenders Harris County, Texas 1201 Franklin, 13th floor Houston, Texas 77002
COUNSEL ON APPEAL FOR APPELLANT:	Nicholas Mensch State Bar of Texas No. 24070262 Assistant Public Defender Harris County, Texas 1201 Franklin, 13th floor Houston, Texas 77002

TRIAL COUNSEL FOR THE STATE:	Robert De Los Reyes State Bar of Texas No. 24092330 Lindsey Hovland State Bar of Texas No. 24086498 Assistant District Attorneys Harris County, Texas 500 Jefferson Street, Suite 600 Houston, Texas 77002
STATE'S COUNSEL AT MOTION FOR NEW TRIAL:	Robert De Los Reyes State Bar of Texas No. 24092330 Lindsey Hovland State Bar of Texas No. 24086498 John Crump State Bar of Texas No. 24077221 Assistant District Attorneys Harris County, Texas 500 Jefferson Street, Suite 600 Houston, Texas 77002
APPELLATE COUNSEL FOR THE STATE:	John Crump State Bar of Texas No. 24077221 Assistant District Attorney Harris County, Texas 500 Jefferson Street, Suite 600 Houston, Texas 77002
PRESIDING JUDGE:	Hon. Robert Johnson 177th District Court Harris County, Texas 1201 Franklin, 19th Floor Houston, Texas 77002

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TO THE HONORABLE JUDGES OF THE COURT OF CRIMINAL APPEALS:

Pursuant to Rules 38.3 and 70.4 of the Texas Rules of Appellate Procedure, Appellant, Suzanne Elizabeth Wexler, submits this reply to the State's brief.

REPLY ARGUMENTS

1. Appellant is not arguing that this Court's decision in *Sheppard v. State* in not applicable to a determination of whether an individual is in custody for purposes of *Miranda*.

The State contends that "Appellant spends much of her argument faulting the court below for using *Sheppard v. State*" and contends that Appellant invited the error for which she complained about in her opening brief by citing to and utilizing the factors articulated in *Sheppard* in her original briefing in the Fourteenth Court of Appeals. (State's Brief on the Merits at 8-9). See *State v. Sheppard*, 271 S.W.3d 281 (Tex. Crim. App. 2008). Appellant contends that the State is expanding Appellant's contentions into an argument that Appellant is not advancing. Appellant's contention is that the Fourteenth Court of Appeals only used these factors in their custody analysis to determine the reasonableness of the officers' actions from their point of view, not how a reasonable person in the Appellant's circumstances would have perceived their physical freedom to be restricted to the degree associated with a formal arrest based upon the actions of the officers.

At no point in her briefing does Appellant contend that the factors in *Sheppard* cannot be considered to determine whether an individual is in "custody" for purposes

of *Miranda*. What Appellant contended, and emphasized, was that the Fourteenth Court of Appeals improperly focused on the reasonableness of the facts known to the officers and the reasonableness of their actions when they applied the factors listed in *Sheppard* towards a determination of whether the Appellant was in custody for purposed of *Miranda*. (Appellant's Brief on the Merits at 15-20). See *Dowthitt v. State*, 931 S.W.2d 244, 254 (Tex. Crim. App. 1996). A focus on the facts known to officers and the reasonableness of the officers' actions judged from their perspective at the time of those actions is appropriate in a determination of whether a person has been subjected to an investigative detention under the Fourth Amendment, but that particular focus has no relevance in analysis of whether a person was in "custody" for purposed under *Miranda*.[1]

"The 'inquiry into the circumstances of temporary detention for a Fifth and Sixth Amendment *Miranda* analysis requires a different focus then that for a Fourth Amendment *Terry* stop…The purpose of permitting a temporary detention without probable cause or a warrant is to protect police officers and the general public." *Bates v. State*, 494 S.W.3d 256, 282 (Tex. App.—Texarkana 2015, pet. ref'd) (Burgess, J., concurring), citing *United States v. Smtih*, 3 F.3d 1088, 1096, 1097 (7th Cir. 1993). "By

[1] The State also distinguishes two federal cases that Appellant relies upon in support for this proposition, *Newton* and *Revels*, by indicating that in those decisions the defendants were handcuffed. (State's Brief on the Merits at 12). However, Appellant cited to those cases to demonstrate that a person can be lawfully subjected to an investigative detention under the Fourth Amendment, but still be in custody for purposes of *Miranda*. (Appellant's Brief on the Merits at 17). This distinction is critical to Appellant's contention that the Fourteenth Court of Appeals improperly analyzed at least some of the factors by only looking at the reasonableness of the officers' actions from their point of view.

contrast, 'the basis of [the *Miranda*] decision was the need to protect the fairness of the trial…." *Id.*, quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 240-241 (1973). Contrasting this with the rights guaranteed by the Fourth Amendment, the U.S. Supreme Court stated:

> There is a vast difference between those rights that protect a fair criminal trial and the rights guaranteed by the Fourth Amendment….
>
> …
>
> The Fourth Amendment is not an adjunct to the ascertainment of truth. The guarantees of the Fourth Amendment stand as a protection of quite different constitutional values – values reflecting the concerns of our society for the right of each individual to be left alone….
>
> ….
>
> ….The considerations that informed the Court's holding in *Miranda* are simply inapplicable to the present case.

Id., quoting *Schneckloth*, 412 U.S. at 246 (internal quotations omitted)

In addition, "even though the privacy interest protected by the Fourth and Fifth Amendments overlap, the exceptions to their protections are significantly different and inapplicable to each other." *Id.*, citing *Fisher v. United States*, 425 U.S. 391, 400 (1976). The U.S. Supreme Court in *Fisher* "noted that these distinctions were not incidental, but were carefully crafted into the Bill of Rights by the Constitution's framers:

> They struck a balance so that when the State's reason to believe incriminating evidence will be found becomes sufficiently great, the invasion of privacy becomes justified and a warrant to search and seize will issue. They did not seek in still another Amendment[—]the Fifth[—

>]to achieve a general protection of privacy but to deal with the more specific issue of compelled self-incrimination."

Id. at 283, citing *Fisher*, 425 U.S. at 400.

"[T]he requirements of *Miranda* arise from Fifth Amendment protections." *State v. Ortiz*, 346 S.W.3d 127, 133 (Tex. App.—Amarillo 2011), *aff'd*, 382 S.W.3d 367 (Tex. Crim. App. 2012) (noting that determination of whether an officer handcuffing an individual for purposes of his own safety placed that individual in custody for purposes of the Fifth Amendment did "not turn on the reasonableness under the Fourth Amendment"), citing *Dickerson v. United States*, 530 U.S. 428, 440 fn. 4 (2000). Because of this, the determination of whether the Appellant being forced to leave her residence by an overwhelming police presence and then put into the back of a patrol car by that same law enforcement personnel "placed [her] in custody for *Miranda* purposes does not turn on the reasonableness under the Fourth Amendment" of the officers' actions. *Id.*, citing *United States v. Newton*, 369 F.3d 659, 675 (2nd Cir. 2004), *Dowthitt*, 931 S.W.2d at 254, and *United States v. Revels*, 510 F.3d 1269, 1274 (10th Cir. 2007).

As Appellant contended in her opening brief, an individual can be lawfully subjected to an investigative decision under the Fourth Amendment, but still be in "custody" for purposes of *Miranda.* (Appellant's Brief on the Merits at 17). Notably, in concluding that Appellant was not subjected to a custodial interrogation, the Fourteenth Court of Appeals found that there was evidence supporting a

determination that an investigation was underway when the Appellant was detained. *Wexler v. State*, 593 S.W.3d 772, 780 (Tex. App.—Houston [14th Dist.] 2019, pet. granted), citing *Mount v. State*, 217 S.W.3d 716, 724 (Tex. App.—Houston [14th Dist.] 2007, no pet.) ("Whether a person is under arrest or subject to a temporary investigative detention is a matter of degree and depends upon the length of the detention, the amount of force employed, and whether the officer actually conducts an investigation.").[2] In addition, the Court of Appeals noted that Appellant was detained so a protective sweep could be performed. *Id.* In neither of these determinations did the Court of Appeals focus on whether a reasonable person in the same circumstances as the Appellant would have perceived their physical freedom to be restricted to the degree associated with a formal arrest. Instead, the Court of Appeals used these findings to justify the officers' actions in light of the facts known to them at the time of their search of the residence and detention of the Appellant. See *Rhodes v. State*, 945 S.W.2d 115, 118 (Tex. Crim. App. 1997) ("the test for reasonableness under the Fourth Amendment is not capable of precise definition or mechanical definition. 'Reasonableness' must be judged from the perspective of a reasonable officer at the scene, rather than within the advantage of hindsight."). The

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[2] In *Mount*, the defendant contended, among other things, that the trial court erred by denying his motion to suppress because his initial detention was unlawful as it was an illegal arrest. *Mount*, 217 S.W.3d at 724. The Fourteenth Court of Appeals disagreed that the traffic stop was transformed into an unlawful arrest, noting that officers drew their weapons due to the safety concerns of the officer and that officers were actually conducting an investigation that eventually resulted in their belief that the defendant was driving while intoxicated. *Id.* at 724-727. Notably, no issue was raised regarding whether the defendant had been subjected to a custodial interrogation.

Court of Appeals simply recited why the officers decided to use the actions they did in effectuating their search of the residence for narcotics in their determination that Appellant was not subjected to a custodial interrogation. However, this is not relevant to a custody determination under *Miranda*. What was missing from their analysis was how those actions would have been perceived by a reasonable person in the Appellant's situation. For example, if Appellant had been informed by an officer that she was not under arrest and was being detained for investigative or safety purposes when she was placed into the back of the patrol car, that would be evidence related to a custody determination because it might have an effect upon whether a reasonable person in the same circumstances as the Appellant would have perceived their physical freedom to be restricted to the degree associated with a formal arrest. See *Koch v. State*, 484 S.W.3d 482, 490 (Tex. App.—Houston [1st Dist.] 2016, no pet.) (although defendant was handcuffed and placed into the back of a police car, Court determined that defendant was not in custody, in part, because officer communicated to defendant that he was not under arrest when she placed him in the back of patrol car).[3] However, no such evidence, or similar evidence, exists in this case. Neither Detective Hill, nor any other officer, informed Appellant that she was not under arrest and was only being detained for investigative or safety purposes.

[3] The First Court of Appeals specifically noted that "appellant was explicitly told that he was not under arrest but was instead detained pending further investigation." *Koch*, 484 S.W.3d at 491.

The State further criticizes Appellant by contending that she invited the error for which she complains about because she cited to *Sheppard* in her briefing in the Fourteenth Court of Appeals. Appellant did cite to *Sheppard* factors in her opening brief in the Fourteenth Court of Appeals. (Appellant's Opening Brief at 10). However, contrary to the State's contention, Appellant never invited the Fourteenth Court of Appeals to analyze Appellant's issue by focusing only on the facts known to officers and the reasonableness of the officers' actions judge from their perspective at the time of those actions. The applicable standard that Appellant contended in the lower court is the same standard that she is contending applies in this Court:

> "In determining whether an individual is in custody, a court must first examine all of the circumstances surrounding the interrogation, but the ultimate inquiry is simply whether there was a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest." *Estrada v. State*, 313 S.W.3d 274, 294 (Tex. Crim. App. 2009), citing *Stansbury v. California*, 511 U.S. 318 (1994) and *Dowthitt v. State*, 931 S.W.2d 244, 263 (Tex. Crim. App. 1996). "A person is considered in custody if a reasonable person in the same circumstances would have perceived their physical freedom to be restricted 'to the degree associated with a formal arrest.'" *Martinez*, 496 S.W.3d at 218-219, quoting *Dowthitt*, 931 S.W.2d at 254. See also *Thompson v. Keohane*, 516 U.S. 99 (1995)

(Appellant's Opening Brief at 8-9) (citations and quotations included)[4]

[4] Appellant also cited to *Sheppard* in her motion for en banc reconsideration. (Motion for en banc reconsideration at 5). However, like in her original brief in the Fourteenth Court of Appeals, Appellant contended that the applicable standard is whether "[a] person is considered in custody if a reasonable person in the same circumstances would have perceived their physical freedom to be restricted 'to the degree associated with a formal arrest.'" (Motion for en banc reconsideration at 4). Again, Appellant never invited the Fourteenth Court of Appeals to analyze Appellant's issue by focusing only on the facts known to officers and the reasonableness of the officers' actions judged from their perspective at the time of those actions.

In this Court, Appellant is contending that the Fourteenth Court of Appeals erred when it determined that the Appellant was not subjected to a custodial interrogation. In the Court of Appeals, Appellant contended that the appropriate standard focused on whether a reasonable person in the same circumstances would have perceived their physical freedom to be restricted to the degree associated with a formal arrest. At no point did Appellant contend that the Fourteenth Court of Appeals could analyze her issue by utilizing a standard that is more appropriate for a Fourth Amendment analysis, a standard that focuses on the facts known to officers and the reasonableness of their actions in light of those facts, despite the State's contention. Again, Appellant is not contending that the factors in *Sheppard* do not apply to a determination of custody, it was the manner in which those factors where considered that forms the bases of Appellant's complaint. Appellant believes that the Fourteenth Court of Appeals did not follow the appropriate standard when evaluating at least some of the evidence in this case in their determination that the Appellant was not in custody. It would seem appropriate that Appellant should be able make a complaint when this was not due to any invitation of the part of the Appellant.

2. An implicit finding that Appellant was unaware that a large contingent of officers were on scene is not supported by the record.

Quoting from numerous cases decided by this Court, the State places great emphasizes on the trial court's role as the factfinder and its ability to believe or disbelieve evidence in responding to Appellant's, and to an extent, the Dissenting

Justice's contention's regarding what the record demonstrated Appellant would have been aware of. (State's Brief at 14-16, 23-24), quoting *State v. Ross*, 32 S.W.3d 853, 856 (Tex. Crim. App. 2000) ("In a motion to suppress hearing, the trial court is the sole trier of fact and judge of the credibility of the witnesses" and "judge may believe or disbelieve all or any part of a witness's testimony even if the that testimony is not controverted"), *Robb v. State*, 434 S.W.3d 613, 617 (Tex. Crim. App. 2014) (noting that fact finders are permitted to draw reasonable inferences if supported by the evidence), and *Herrera v. State*, 241 S.W.3d 520, 526 (Tex. Crim. App. 2007) (courts are to review implied findings in the light most favorable to the ruling). However, Appellant believes that the State's contention is flawed. Although the State correctly asserts that appellate courts are to review the evidence in the light most favorable to the trial court's ruling, the State fails to acknowledge the entirety of what this Court wrote in *Herrera*:

> Additionally, when a trial judge denies a motion to suppress and does not enter findings of fact, the evidence is viewed in the light most favorable to the trial court's ruling *and we assume that the trial court made implicit findings of fact that support its ruling as long as those findings are supported by the record.*

Herrera, 241 S.W.3d at 527 (internal quotations omitted and emphasis added)

The State contends that "[t]he trial court was under no obligation to believe that Appellant was aware of any of the facts that Appellant now advances, much *[sic]* give credit to their combined force." (State's Brief on the Merits at 15). In addition, the State repeatedly contends that "[w]hile there was no affirmative evidence that

Appellant was aware of *any* of the facts that she advances, the trial court could have disregarded any of those facts if it so desired." (State's Brief at 15-16). However, the State fails to address how an implied finding that Appellant was unaware of the magnitude of the officers presence would be supported by the evidence.

Detective Hill testified that officers with the HROU announced their presence through the PA system in an armored vehicle. (3 R.R. (Trial) at 46, 50). Specifically, PA from the armored vehicle told everyone inside to come out of the house and that a search warrant was being served on the residence. (3 R.R. (Trial) at 46). Detective Hill's testimony indicated that Appellant was aware that HROU had announced over a PA that they had a search warrant when she came out of the resident. (3 R.R. (Trial) at 50).[5] According to Detective Hill, when HROU arrived on scene, Appellant and another male responded to the broadcast and came out of the residence. (3 R.R. (Trial) at 46-47). Furthermore, once Appellant stepped out of the house the HROU officers, who appeared to be either entering the residence as Appellant was coming out, or were already in the residence as she was coming out., detained her and placed her into the back of a police car. (3 R.R. (Trial) at 46-47, 49, 51). These officers were described as like SWAT officers by Detective Hill. (3 R.R. (Trial at 43-46).

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[5] Q: So the people in the house knew that there was going to be a search?

A: That's correct.

(3 R.R. (Trial) at 50).

Even without consideration of an armored vehicle or an exact number of officers, the uncontroverted evidence establishes that Appellant heard orders from a PA to leave the residence as a search warrant was being executed.[6] As the Appellant exited the residence she was immediately detained by HROU officers, officers who were described as SWAT like officers.[7] It was these same officers who then placed her in the back of a police car. According to the State, the trial court was free to disregard all of this evidence and make an implied finding that Appellant would not have been aware of the presence of potentially even the officers who detained her and placed her into the patrol car. (State's Brief on the Merits at 16). That type of an implied finding would defy common sense as it is clear that the Appellant did not walk out of the residence on her own accord and put herself into the back of a patrol car. The evidence clearly indicates she was ordered to do so and that HROU officers immediately detained her and placed her into the back of a patrol car. Thus, the implied finding that the State seems to want this Court to rely upon, a finding that Appellant was seemingly unware of any officers on scene, would not be reasonably supported by the evidence, and would not be an implied finding that this Court could

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[6] Appellant still contends that she would have been aware of the presence of the armored vehicle. Detective Hill testified that the PA announcing the presence of the officers came from this vehicle and his testimony, along with the State's questioning, treats the armored vehicle as being on the scene. (3 R.R. (Trial) at 45).

[7] While the exact number of officers who detained Appellant is not affirmatively indicated within the record, Detective Hill's testimony appears to indicate that it was more than one officer who detained her. In addition, according to Detective Hill, other HROU officers were either entering the residence, or had already entered the residence, as the Appellant was exiting it. (3 R.R. (Trial) at 49-51).

assume was made by the trial court. See *Herrera*, 241 S.W.3d at 527. Based on the evidence, it would stand to reason that Appellant was aware that there were a number of HROU officers on scene executing a search warrant as those very same officers were the ones who detained her and placed her in the back of the patrol car.

3. The State's misreads this Court's decision in *State v. Ortiz* in their attempt to distinguish its holding from this case. Furthermore, the Dissenting Justice's reliance on officers targeting a specific residence and suspect is relevant in a determination that Appellant was in custody.

The State attempts to distinguish this Court's decision in *State v. Ortiz*, 382 S.W.3d 367 (Tex. Crim. App. 2012). (State's Brief on the Merits at 20-22). One of the ways that the State attempts to do so is through their contention that the officers in *Ortiz* had the drugs in their hands at the time they questioned and handcuffed the defendant, the implication being the defendant knew that drugs had been discovered on his wife at the time he made his incriminating statement. (State's Brief on the Merits at 20). Because of this, the State concludes that a reasonable person in that defendant's position would know that they were under arrest, unlike in the Appellant's case as contraband had not been discovered at the time of Detective Hill's question. Appellant contends that the State misreads the facts in *Ortiz*.

In *Ortiz*, while an officer named Johnson was searching the defendant, another officer had the defendant's wife step out of a vehicle in order to perform pat down search. *Ortiz*, 382 S.W.3d at 370. The defendant's wife apparently made movements to avert the patdown and she was handcuffed. *Id.* "Shortly after handcuffing Ms. Ortiz,

[the other officers] signaled to Johnson, indicating that they had apparently discovered something during the patdown of Mrs. Ortiz. Johnson then handcuffed the defendant." *Id.* One of the officers then informed Officer Johnson that "something" was found under the skirt of the defendant's wife. *Id.* Afterwards, Officer Johnson asked the defendant what kind of drugs his wife had, the defendant indicated it was cocaine. *Id.*

Despite the State's apparent contention that the defendant was aware that the officers had already discovered drugs on his wife, the State does not reference a footnote that the other officer did not specifically say that this "something" was cocaine, that this information was not related within earshot of the defendant, and this specific fact was omitted from the custody analysis conducted in *Ortiz*. *Ortiz*, 382 S.W.3d at 370, fn. 11. Specifically, this Court wrote:

> Later in his testimony, Johnson revealed that the "something" under Mrs. Ortiz's skirt was a kilo of cocaine that was duct taped to her leg. At the time Pierpoint revealed that "something" was under Mrs. Ortiz's skirt, Pierpoint did not know—or at least did not specifically say—that the "something" she had was cocaine. *Because Pierpoint did not specifically say that Mrs. Ortiz had cocaine, that information was not related to Johnson within the appellee's earshot, and we will also omit this specific fact from our custody analysis*.

Id. (emphasis added)

Thus, the State's attempt to distinguish *Ortiz* on this ground is without merit.

In addition, the State criticizes the Dissenting Justice's reliance on officers targeting a specific house, contending that officers never told her she was a prime

suspect and did not convey that she was to her. (State's Brief on the Merits at 24). Initially, Appellant notes that the State, at the very least, acknowledges that Detective Hill's statement did indicate a suspicion that Appellant was involved in criminal activity, even though officers had not yet discovered the narcotics themselves. (State's Brief on the Merits at 18). However, Detective Hill's statement did more than that. Detective Hill told the Appellant "We have a search warrant. *Tell me where the narcotics are*. It will save us some time doing the search. *We're going to find it no matter what*." (3 R.R. (Trial) at 52, 58) (emphasis added). Essentially, he told the Appellant that I know that you are possession of narcotics, tell me where they are. Detective Hill's question specifically conveyed to the Appellant that he suspected she was in possession of narcotics, the implication being that drugs were in the house, and that she knew where they were located. While Detective Hill did not use the terms "prime suspect" or "suspect", he conveyed his belief to the Appellant that she was a suspect and in possession of narcotics when he told that that she should tell him where the drugs were as they were going to find it anyways. A reasonable person in the Appellant's position would have interpreted this question as a statement that Detective Hill knew she was in possession of narcotics and knew where they were located. Therefore, Detective Hill's subjective belief that she was a suspect is a factor that can be utilized in a custody determination, along with the other factors she contends that are applicable. See *Aguilera v. State*, 425 S.W.3d 448, 456 (Tex. App.—Houston [14th

Dist.] 2011, pet. ref'd), citing *Dowthitt*, 931 S.W.2d at 254 and *Stansbury v. California*, 511 U.S. 318, 323 (1994).

PRAYER

Appellant, Suzanne Elizabeth Wexler, prays for this Court to reverse the Fourteenth Court of Appeals' judgment and the trial court's judgment, and remand Appellant's case back to the trial court for a new trial. Alternatively, Appellant respectfully requests that this Court reverse the Fourteenth Court of Appeals judgment and remand Appellant's case back to the Fourteenth Court of Appeals for a determination of harm. Appellant also prays for such other relief that this Court may deem appropriate.

Respectfully submitted,

Alexander Bunin
Chief Public Defender
Harris County Texas

/s/ Nicholas Mensch
Nicholas Mensch
Assistant Public Defender
Harris County, Texas
State Bar of Texas No. 24070262
1201 Franklin, 13th floor
Houston, Texas 77002
Phone: (713) 274-6700
Fax: (713) 368-9278
nicholas.mensch@pdo.hctx.net

Attorney for Appellant
Suzanne Elizabeth Wexler

CERTIFICATE OF SERVICE

I certify that a copy of Appellant's Reply Brief was served on John Crump of the Harris County District Attorney's Office and Stacey Soule of the Office of State Prosecuting Attorney on September 15, 2020 to the email addresses on file with the Texas e-filing system.

/s/ Nicholas Mensch
Nicholas Mensch

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Bar No. 24070262
nicholas.mensch@pdo.hctx.net
Envelope ID: 46244379
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Associated Case Party: Harris County District Attorney's Office

Name	BarNumber	Email	TimestampSubmitted	Status
John DavidCrump		crump_john@dao.hctx.net	9/15/2020 12:19:00 PM	SENT

Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Stacey Soule		information@spa.texas.gov	9/15/2020 12:19:00 PM	SENT

Associated Case Party: SuzanneElizabethWexler

Name	BarNumber	Email	TimestampSubmitted	Status
Nicholas Mensch		nicholas.mensch@pdo.hctx.net	9/15/2020 12:19:00 PM	SENT